82-1319

No.

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections,

Petitioner,

-v-

ALFRED EUGENE GRIZZELL,

Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

JIM SMITH
Attorney General

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QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURT APPLIED THE WRONG STANDARD OF REVIEW.

II.

WHETHER THE LOWER COURT PROPERLY APPLIED THE PROVISIONS OF **28 U.S.C.A. § 2254(b).**

III.

WHETHER THE DECISION OF THE LOWER COURT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF THIS COURT IN **Michigan v. Tucker,** 404 U.S. 443 (1972).

IV.

WHETHER THE LOWER COURT ERRED IN CHARACTERIZING GRIZZELL'S ALIBI TESTIMONY AS DEMONSTRATING NO INTERNAL INCONSISTENCIES.

V.

WHETHER THE LOWER COURT MISAPPLIED **Zilka v. Estelle,** 529 F.2d 388 (5th Cir. 1976).

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OTHER AUTHORITIES

The petitioner, Louie L. Wainwright, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on November 29, 1982.

OPINIONS BELOW

The opinion of the lower court filed November 29, 1982 is reproduced in its entirety in the appendix to this brief. The magistrate's report and recommendation, objections to the report and recommendation, and the order of the district judge granting the petition for writ of habeas corpus are also reproduced in the appendix.

JURISDICTIONAL STATEMENT

The judgement of the Eleventh Circuit Court of Appeals was entered on November 29, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

The Fifth Amendment to the federal constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the federal constitution provides in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

> liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 3.390, Florida Rules of Criminal Procedure, provides in pertinent part:

> (d) No party may assign as error grounds of appeal the giving or the failure to giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of [the presence of] the jury.

STATEMENT OF THE CASE

A. History of the Case

Respondent filed his petition for writ of habeas corpus in the district court on December 20, 1976 (R Vol.I, Doc. 1).* The basis for his claim for relief was that at his trial in March 1964, the prosecutor used a prior invalid conviction for the purpose of impeaching his credibility. Pursuant to an order to show cause, petitioner filed his response on April 4, 1977 (R Vol.I, Doc. 3). Following a subsequent order to show cause, petitioner filed a supplemental response (R Vol.I, Doc. 10). In this supplemental response, petitioner took the position that the question asked by the prosecutor with reference to whether respondent had ever

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* References are to the record filed in the court below.

been convicted of a crime constituted at best harmless error (R Vol.I, Doc. 10, Exs. 1, 2, 3). By order dated August 8, 1978, the district judge pointed out that impeachment by use of prior counselless felony convictions is error of constitutional dimension but can in certain instances be harmless error. Respondent was given thirty days in which to supply certain pleadings showing that his prior convictions were, in fact, counselless. Such evidence was subsequently supplied (R Vol.I, Doc. 13). Pursuant to order, petitioner supplied the district judge with a complete transcript of respondent's state court trial (R Vol.II, Doc. 14).

The cause was heard before the Honorable Paul Game, Jr., United States Magistrate, on January 28, 1980, and the transcript of those proceedings comprise Vol.III of the record on appeal filed in

the lower court. The magistrate's report and recommendation was filed September 17, 1980 (R Vol.II, Doc. 18). Petitioner's objections to the report and recommendation was filed on September 26, 1980 (R Vol.II, Doc. 21). The district judge by order filed December 12, 1980, granted respondent's petition for writ of habeas corpus (R Vol. II, Doc. 23). The Eleventh Circuit Court of Appeals affirmed the order of the district judge granting the petition for writ of habeas corpus, opinion filed November 29, 1982.

B. Statement of the Facts

Respondent, together with his brother, Troy Grizzell, were charged with the February 13, 1963, robbery of the Lake Lucina Lounge in Jacksonville, Florida. Trial began on March 9, 1964, and the jury

returned verdicts of guilty the following day.

The state's evidence at trial linking respondent to the crime consisted of the eyewitness identification testimony of three witnesses. The three witnesses for the state included Navadean Green, the clerk on duty at the time the package store was robbed; Origus Jones, a porter/ maintenance man at the package store; and Wallace Earle, a customer at the package store just prior to the commission of the crime.

Ms. Green testified that respondent had initially come into the package store at 12:30 p.m. on February 13, 1963, and purchased a 7-up. According to Ms. Green, respondent returned to the store approximately half an hour later (1:00 p.m.) and robbed her at gunpoint. She initially identified respondent from a

photopak given to her by the investigating officer, Detective Britts. At the preliminary hearing, Ms. Green testified that she was 75 percent sure of her identification of respondent; however, at trial she stated that she was absolutely positive of her identification of respondent as being the person who robbed her.

Mr. Jones testified that he saw respondent purchase a 7-up at the package store at approximately 12:30 p.m. on the day the robbery occurred. Mr. Jones also initially identified respondent from a photopak given him by the investigating officer. At trial, Mr. Jones indicated that he was positive that respondent was the man he had seen at the package store on the day the robbery occurred.

Mr. Earle testified that he saw respondent enter the package store and then back into a phone booth inside the package

store at the approximate time the robbery occurred. Mr. Earle, feeling that there was something suspicious about respondent's behavior and that of a second man who entered the package store as he was leaving, made a mental note of the license number of the car parked just outside the store. This license number supplied by Mr. Earle matched the license plate of the car owned by respondent's codefendant, Troy Grizzell, except for one digit which was blocked from Mr. Earle's view because of a trailer hitch on the vehicle. Although Mr. Earle was unable to identify anyone from a police lineup, he did later identify respondent from a photopak. However, at the time of trial Mr. Earle was positive of his identification of respondent as being the man he saw in the package store on the day the robbery occurred.

Respondent relied upon an alibi defense. He claimed that he was staying at a motel in Tampa, Florida, on the day of the robbery. Mrs. Mae Morrison, owner of a motel in Tampa, Florida, was called as a witness to testify in respondent's behalf. She had no independent recollection of respondent checking into the motel, could not identify him as being a person who had checked in the motel, but she was able to identify her signature on a registration receipt purportedly given to respondent which apparently bore the date of February 13, 1963*. Mrs. Morrison did not know the time or to whom the receipt had been given. She did state that her husband

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* There is no independent proof as to who put the date on the registration receipt; all Mrs. Morrison could do was to identify her signature thereon.

usually came on duty at the front desk between 5:30 and 6:00 p.m.

Respondent's testimony at trial was that he left Jacksonville at approximately 10:00 a.m. on February 13, 1963 (date of robbery), and arrived at Mrs. Morrison's motel in Tampa between 3:00 and 3:30 p.m. that afternoon. In explanation of why Ms. Green and Mr. Jones had recognized his photograph in the photopak, respondent testified that he had made deliveries to the package store while working for a local beer distrubutor. Respondent had no explanation of how Mr. Earle was able to make a positive identification of him as being the person he saw in the package store on the date in question.

On cross-examination, the following occurred:

CROSS-EXAMINATION BY MR. NICHOLS:

Q. You are Alfred Eugene Grizzell?

A. Yes, sir.

Q. Have you ever been convicted of a crime?

A. Yes, sir.

Q. How many times?

BY MR. RICHARDSON:

Objection, your Honor.

MR. PALMER: Objection, your Honor.

COURT: Objection sustained.

MR. NICHOLS: No further questions.

MR. PALMER: No further questions.

The only other mention of this prior conviction was in the state trial judge's instructions to the jury. Note the following:

> Now, while the defendants were on the stand one of the defendants, Alfred Grizzell, was asked whether he had previously been convicted of a crime and he testified that he had. Now, gentlemen, you will not consider the testimony that he had been previously convicted of a crime in any wise as evidence of his guilt or innocence of the charge that he is now before you being tried. This is permitted to

> go before you solely as it affects his credibility as a witness and as it goes to his veracity or his truthfulness as a witness and nothing else.

(R Vol.I, Doc. 10, Ex. 3) The transcript of respondent's state court trial does not reveal that any objection was made to the above-quoted instruction. Respondent has never contended that he received ineffective assistance of counsel at his state court trial.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT APPLIED THE WRONG STANDARD OF REVIEW.

In affirming the decision of the district judge, the lower court relied on the retroactive application of Gideon v. Wainwright, 372 U.S. 335 (1963), to determine constitutional error. The court below relied on Loper v. Beto, 405 U.S. 473 (1972), for the premise that a due process violation occurs when prior counselless

convictions, constitutionally invalid under Gideon, are used to impeach a defendant's credibility if their use might well have influenced the outcome of the case, citing Burgett v. Texas, 389 U.S. 109 (1967).

First, petitioner respectfully requests this Court to read footnote 1 in Loper, 405 U.S. 474-478, and then compare what transpired in Loper's trial with the relatively insignificant and innocuous questions that were asked of respondent at his state court trial. To say that there is as much difference between the record in Loper and what transpired sub judice as there is between night and day is not too much of an exaggeration.

The lower court stated in so many words that it was not unmindful of the substantial evidence placing Grizzell at the scene of the crime. However, it hastened to point out that the question is not whether

there was sufficient evidence on which respondent could have been convicted without the evidence complained of, but whether the challenged evidence may have influenced the fact-finder's deliberations, citing Harryman v. Estelle, 597 F.2d 927 (5th Cir. 1979), cert.denied, 449 U.S. 860 (1980). Thus, in determining "whether the evidence complained of may have influenced the fact-finder's deliberations," the lower court employed what can only be described as a conjectural standard to determine prejudicial error. This does not even meet the "plain error" requirement of Rule 52(b) of the Federal Rules of Criminal Procedure, much less this Court's rationale in United States v. Frady, ____U.S.____, 71 L.Ed.2d 816, 102 S.Ct. _____(1982). In fact, the lower court does not so much as mention Frady in its opinion, much less follow the well-settled principle that to obtain

collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal. Frady, 71 L.Ed.2d 829.

Instead of following the principle that in order to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal and employing the "cause and actual prejudice" standard reaffirmed in Frady, the lower court bottomed its decision on the approach followed in Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976). However, the lower court admitted, as it must, that the key inquiry was whether the error was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18 (1976). In determining harmless error vel non the lower court rejected the rationale of Frady and at best followed the "plain error" standard of Rule 52(b) of the

Federal Rules of Criminal Procedure. This is understandable because the same erroneous standard was followed by the magistrate and approved by the district judge. In his report and recommendation (R Vol.II, Document 18)*, the magistrate stated: "Although in light of the evidence presented, there is a high degree of possibility that the jury would still have reached a verdict of guilty, ..." Petitioner understands this as being just another way of saying that the error was harmless beyond a reasonable doubt, and thus within the Chapman rule. But then the magistrate goes on to say: "[I]t is impossible in this case to conclusively say that the jury would have reached the same result

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* References are to the record filed in the lower court.

without the introduction of the impermissible evidence."

The above-quoted remarks of the magistrate not only are contradictory, but the latter statement presents an impossible standard. For example, in determining to apply the harmless error rule to constitutional error, no judge would be able to "conclusively say" that the jury would have reached the same result without the error, i.e., the introduction of the impermissible evidence. The magistrate thus imposed a higher standard for determining harmless error than that stated in Chapman, and it is submitted that this same standard was followed by the lower court. Again, the district judge in her order granting petition for writ of habeas corpus (R Vol.II, Document 23) adopted the standard used by the magistrate by finding that "the Magistrate's Report and Recommendation is

both legally sound and consistent with the ends of justice." It is difficult to view the lower court's affirmance of the standard followed by the district judge as anything but a deliberate refusal to follow the standard set forth by this Court in Frady.

In determining the prejudicial effect, if any, of the jury instruction (A 433, 443), the lower court did not even mention Henderson v. Kibbe, 431 U.S. 145 (1977), reaffirmed with approval by this Court in Frady. Much less did the lower court find that the instruction "so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973).

In fine, petitioner submits that the conjectural standard of what "might have contributed to the jury's decision" is best

exemplified by the concluding paragraph of its opinion. Please note:

> Whether the jury would believe Grizzell, no one can tell. But he was entitled to have his testimony weighed by the jury unencumbered by the unconstitutional convictions. The jury was instructed specifically that the convictions could be used to evaluate his credibility. The district court correctly decided that there is a reasonable possibility that the constitutionally infirm evidence might have contributed to the jury's decision as to credibility, and hence to the conviction.

(A 512) The above-quoted remarks show that the lower court in affirming the order of the district court unmistakably based its finding of reversible error on conjecture. The Florida Supreme Court does not predicate reversible error on conjecture.

In Sullivan v. State, 303 So.2d 632 (Fla. 1974), the court in considering the impact of a codefendant's remarks before a jury had this to say:

> We cannot know how the jury construed his answer, or what weight was given to it; therefore, to assert that it was construed as meaning he had already passed it would be pure speculation on our part. Reversible error cannot be predicated on conjecture. Singer v. State, 109 So.2d 7 (Fla. 1959).

Id. at 635. It is submitted that a conflict between the decisional law of the highest court of a state and that of any circuit court of appeals provides a valid reason for the issuance of a writ of certiorari.

II. THE DECISION OF THE LOWER COURT EMASCULATES THE PROVISIONS OF § 2254(d), U.S.C.A.

This is interesting. The lower court candidly admits that deference should be paid to a state court's evaluation of how proceedings in court might affect the jury (A 473). But no deference was given to the state court decision, even though the finding of the state court trial judge was

affirmed on appeal to the Florida First District Court of Appeal, reported at 338 So.2d 844. Petitioner finds nothing in the opinion of the court below that even purports to give at least minimal weight to the finding of the state court judge that the effect of the claimed error was "minimal or nonexistent."

But respondent may be heard to contend that Sumner v. Mata, 449 U.S. 539 (1981), applies only to purely factual questions. Such a construction renders Sumner a nullity because no issue in a federal habeas case is purely factual. The facts of necessity must always be applied to legal principles. The interpretation of Sumner and § 2254(d) given by the lower court will result in a de novo review of all cases by the federal courts and reduce the function of the state courts to that of determining "historical facts" which are to

be applied by the federal courts in determining the "ultimate" facts. A classic example of this is Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), reh'g granted, Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980), cert.denied, Estelle v. Jurek, 450 U.S. 1001 (1981), wherein the voluntariness of statements was classed as a mixed question of law and fact which authorized the court of appeals to determine, without regard to the state court finding, whether the statements were freely and voluntarily given.

It is submitted that § 2254(d) was designed to reduce federal intrusion into state court findings after an evidentiary hearing. This salutary purpose is totally defeated if the findings may be summarily disregarded by merely saying all issues are mixed questions of law and fact. Frankly, one must wonder why all criminal prosecu-

tions are not conducted in the federal courts in the first instance if the state courts' findings of ultimate facts or "mixed questions of law and fact" are to be given no credence whatsoever.

The pattern and practice of the federal courts of appeals in both the Fifth and Eleventh Circuits, as established by Jurek and the cases cited by the lower court (A-463, 473) militates against any semblance of finality; results in de novo review of state court trials and appeals; denigrates the state courts as institutions and deprives the state of its constitutional right to operate a criminal justice system. One of the powers retained by the states under the federal constitution was the power to maintain a state judicial system for the decision of legal controversies. Atlantic Coast Line R. Co. v. Engineers, 398 U.S. 281 (1970).

It is noted that substantially similar issues are presently pending before this Court in Marshall v. Lonberger, Case No. 81-420, cert. granted January 11, 1981.

III. NOT ONLY DID THE LOWER COURT EMPLOY AN INCORRECT STANDARD FOR REVIEW, IT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF THIS COURT IN MICHIGAN V. TUCKER, 404 U.S. 443 (1972).

Let's revisit Tucker for a few minutes. At the trial level, the prosecutor on cross-examination asked Tucker whether he had previously been convicted of any felonies. Tucker acknowledged three previous felony convictions. The jury convicted and the maximum sentence was imposed. Several years later, it was determined that two of the felony convictions were invalid because Tucker had not been represented by counsel. Subsequently, a proceeding under 28

U.S.C.A. § 2255 was instituted claiming that introduction into evidence of prior invalid convictions had fatally tainted the jury's verdict of guilt. In a similar context, this is precisely what respondent urged in the lower courts. Back to Tucker: The federal district judge agreed with Tucker that the use of constitutionally invalid prior convictions on cross-examination for impeachment purposes was error. But this notwithstanding, it was held that the error was harmless beyond a reasonable doubt in view of the overwhelming evidence that Tucker was guilty of the bank robbery.

On appeal, the Ninth Circuit agreed that the evidence of prior convictions did not contribute to the verdict obtained and that with respect to the verdict of guilty, the error in receiving such evidence was harmless beyond a reasonable doubt. How-

ever, because of the probability that the invalid prior convictions may have influenced the trial judge to impose a heavier sentence than he would have otherwise, the Ninth Circuit remanded the case for resentencing without any consideration of any prior invalid convictions. The government petitioned for certiorari which was granted. This Court affirmed the decision of the court of appeals. In so doing, it put its unmistakable stamp of approval on that part of the decision of the court of appeals holding that the reference to prior convictions on cross-examination for the purpose of impeaching the credibility of Tucker's testimony was harmless error beyond a reasonable doubt. It is respectfully submitted that if the use of three prior felony convictions (two of which were admittedly invalid) as shown in Tucker can be viewed as harmless error,

then there is no way in the realm of reason that the squib of testimony and the state court trial judge's instruction as set forth in the lower court's opinion can be viewed as constituting prejudicial error of sufficient magnitude to justify the affirmance of the district court's grant of federal habeas corpus relief.

IV. THE LOWER COURT'S CHARACTERIZATION OF GRIZZELL'S ALIBI TESTIMONY AS DEMONSTRATING NO INTERNAL INCONSISTENCIES IS ERRONEOUS.

Note the following:

> In this case it is clear that if Grizzell's testimony is believed, he was not physically present when the crime was committed. The alibi demonstated no internal inconsistencies. It was supported to a degree by the inn-keeper's testimony. It was not implausible.

(A-49a.)

The "substantial evidence placing Grizzell at the scene of the crime," mentioned in the lower court opinion

(A-503), was the eyewitness testimony of three persons: 1) Navadean Green, 2) Origus Jones, and 3) Wallace H. Earle. The testimony of all three witnesses unmistakably puts Grizzell at the scene of the robbery at approximately 12:30-1:00 p.m. on February 13, 1963, the day of the robbery. This being so, Grizzell could not have been in Tampa, Florida, as he claims at the time the robbery occurred. This was admitted by the magistrate in his report and recommendation (R Vol.II, Doc. 18, pp. 1, 2). Note the following:

> The State's evidence at trial linking Petitioner to the crime committed, consisted of the identification testimony of Petitioner by three witnesses, and the identification testimony by one of these three witnesses of an automobile owned by Petitioner's codefendant. The three witnesses for the State included Navadean Green, the clerk on duty at the time the package store was robbed, Origus Jones, a porter/maintenance man at the package store and Wallace Earle, a customer at the

> package store just prior to the commission of the crime.

The lower court apparently overlooked the fact that Grizzell at trial testified that he had seen Mrs. Green and Mr. Jones at the lounge on prior occasions when making deliveries for Sunny South Distributor (R Vol.II, Doc. 18, p. 3). If this is true, and we might as well believe that it is true because the magistrate, the district judge, and the lower court believed it, then certainly this testimony out of Grizzell's own mouth lends more weight and credibility to the identification testimony of both Mrs. Green and Mr. Earle. In other words, Mrs. Green and Mr. Earle were positive of their identification of Grizzell because they had seen him on prior occasions! The "degree" of support given Grizzell's alibi by the inn-keeper's testimony is pin-pointed in the magis-

trate's report and recommendation. Note the following:

> Petitioner relied upon an alibi defense, that he was in Tampa, Florida, at the time of the robbery. Mrs. Mae Morrison, owner of a motel in Tampa, Florida, was called as a witness to testify in Petitioner's behalf. Although Mrs. Morrison has no independent recollection of the events in question, she did identify her signature on a registration receipt given to Petitioner (T-110), which apparently bore the date of February 13, 1963, the date the crime was committed. (T-113) Mrs. Morrison testified that she could not remember at what time Petitioner checked into the motel (T-117), but she did acknowledge that her husband usually came on duty at the front desk between 5:30 and 6:00 o'clock. (T-119)

(A-6a, 7a.)

Clearly the "degree" of support referred to in the lower court's opinion is the fact that Grizzell had a registration receipt which apparently bore the date of February 13, 1963, with Mr. Morrison's signature thereon. To say more about the lower

court's effort to boot-strap its decision affirming the district judge's finding of prejudicial error would be gilding the lily.

V. THE LOWER COURT MISAPPLIED ZILKA V. ESTELLE, 529 F.2d 388 (5th Cir. 1976).

First, please note the following quoted from the Zilka opinion:

> Petitioner testified at length in his own behalf. During cross-examination the following exchange occurred:
>
> Q Mr. Zilka, have you ever been convicted of a felony?
>
> A Yes, sir.
>
> Q How many times?
>
> Mr. Pool: We object to that question.
>
> The Court: Overruled; answer the question.
>
> Q How many times, Mr. Zilka?
>
> A Twice.
>
> Q Both of those in Pennsylvania, is that correct?

A Yes, sir.

Id. at 389. First, the lower court forgot to point out that the cross-examination of Zilka was more extensive than that of Grizzell sub judice. Secondly, notwithstanding the fact that Zilka was a circumstantial-evidence case, the harmless error rule was deemed to have been appropriately applied, a fortiori the harmless error rule should have been applied to the instant case where the conviction was based on the direct and positive testimony of three eyewitnesses! The Zilka opinion is replete with instances where the harmless error rule has been applied to constitutional error and in determining that the harmless error rule was applicable, the Zilka court remarked as follows:

> There was no mention of the nature of the prior crimes, which were not similar to the rape charge. Similar crimes would, of course, have a much greater impact

upon the jury. Because of the nature of the crime here involved, this type of impeachment would appear to have a minimal effect at most.

The situation sub judice was not of the type where guilt boiled down to the jury's belief of one of two competing witnesses. Such was the case in Loper v. Beto where the victim of the rape was squared off against the defendant who denied the charge. Although Zilka's credibility was being challenged, the case against him did not rest upon the word of a single conflicting witness so that the impeachment could not have such disastrous consequences. Accord Bates v. Nelson, supra, 485 F.2d at 96.

Reviewing the record as we have, we believe that the error was harmless beyond a reasonable doubt and that the use of the two prior invalid convictions did not influence the jury's decision. Accordingly, we affirm the district court's denial of the writ of habeas corpus.

Affirmed.

Id. at 393. The conclusion is unmistakable that Zilka supports petitioner's contention of harmless error and this is the

precise reason behind the concerted effort made by the lower court to distinguish it.

CONCLUSION

It is submitted that in the district court respondent fell far short of meeting his burden of showing the degree of actual prejudice necessary to overcome society's justified interest in the finality of criminal judgments. Consequently, the lower court erred in affirming the order of the district judge granting the petition for writ of habeas corpus.

Petitioner submits that the instant case is appropriate for summary remand with directions to reconsider in the light of this Court's decision in Frady with a caveat similar to that directed to the Fourth Circuit Court of Appeals in Hutto v. Davis, ___U.S.___, 70 L.Ed.2d 556, 561, 102 S.Ct._____ (1982).

If the Court believes that a summary remand with directions is inappropriate, then petitioner prays that the petition for writ of certiorari be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 1983, 2 copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. Howard W. Skinner, Assistant Federal Public Defender, P. O. Box 4998, Jacksonville, Florida 32201. I further certify that all parties required to be served have been served.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

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APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ALFRED EUGENE GRIZZELL,	:	
Petitioner	:	
vs.	:	No. 76-880 Civ-J-B
LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,	:	
Respondent	:	

REPORT AND RECOMMENDATION

THIS CAUSE came on for consideration upon the filing of a petition for writ of habeas corpus, pro se, in forma pauperis, by state prisoner Alfred Eugene Grizzell. Petitioner is currently incarcerated and serving a term for armed robbery.

In support of his petition for habeas corpus relief, Petitioner alleges and Respondent stipulates that during his trial Petitioner's credibility was impeached by means of prior convictions which had been

obtained against him without affording him the right to counsel and that the prior convictions have subsequently been set aside by the state which had imposed them. Additionally, Petitioner alleges that during closing arguments at trial, the prosecutor made statements to the jury which were highly prejudicial. This closing argument was not made part of the record.

Impeachment by the use of prior counselless felony convictions is error of constitutional dimension [Loper v. Beto, 405 U.S. 473 (1972)], but in certain circumstances, it can be harmless error. [Chapman v. California, 386 U.S. 18 (1969); Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976)]. Harmless error occurs when the proof of the Defendant's guilt is overwhelming, and the jury would have reached the same result without the

introduction of the impermissible evidence. Zilka.

The State's evidence at trial linking Petitioner to the crime committed, consisted of the identification testimony by one of these three witnesses of an automobile owned by Petitioner's co-defendant. The three witnesses for the state included Navadean Green, the clerk on duty at the time the package store was robbed, Origus Jones, a porter/maintenance man at the package store and Wallace Earle, a customer at the package store just prior to the commission of the crime.

Ms. Green testified that Petitioner had initially come into the package store at 12:30 p.m. on February 13, 1963, and purchased a 7-up. According to Ms. Green, Petitioner returned to the store approximately half an hour later (1:00 p.m.), and robbed her at gun point. She

initially identified Petitioner from a photopak given to her by the investigating officer, Detective Britts. (T-27,68). At the preliminary hearing Ms. Green testified that she was 75% sure of her identification of Petitioner (T-26), and at trial she indicated that she was 100% positive of her identification of Petitioner. (T-21,25, 26,27).

Mr. Jones testified that he saw Petitioner purchase a 7-up at the package store at approximately 12:30 p.m. on the day the robbery occurred. (T-39). Mr. Jones also initially identified Petitioner from a photopak given him by the investigating officer. (T-46,60). At trial, Mr. Jones indicated that he was positive that Petitioner was the man he had seen at the package store on the day the robbery occurred. (T-40).

Mr. Earle testified that he saw Petitioner enter the package store, and then back into a phone booth inside the package store at the approximate time the robbery occurred. (T-50,51). Feeling that there was something suspicious about Petitioner's behavior and that of a second man who entered the package store as he was leaving, Mr. Earle also made a mental note of the license number of the car parked just outside the store. (R-51). This license plate number which Mr. Earle later supplied to the police matched the license plate of the car owned by Petitioner's co-defendant except for one digit which was blocked from Mr. Erle's view because of a trailer hitch on the vehicle. Although Mr. Earle was unable to identify anyone from a police line-up (T-51), he did later identify Petitioner from a photopak. (T-51, 68). At the time of trial, Mr. Earle

was positive of his identification of Petitioner (T-60), although he admitted that he could not positively identify Petitioner at the time of the preliminary hearing. (T-60).

Petitioner relied upon an alibi defense, that he was in Tampa, Florida at the time of the robbery. Mrs. Mae Morrison, owner of a motel in Tampa, Florida, was called as a witness to testify in Petitioner's behalf. Although Mrs. Morrison has no independent recollection of the events in question, she did identify her signature on a registration receipt given to Petitioner (T-110), which apparently bore the date of February 13, 1963, the date the crime was committed. (T-113). Mrs. Morrison testified that she could not remember at what time Petitioner checked into the motel (T-117), but she did acknowledge that her husband <u>usually</u> came

on duty at the front desk between 5:30 and 6:00. (T-119).

Petitioner then took the stand in his own behalf to testify to the time of his arrival in Tampa on February 13, 1963, and to explain why the three identification witnesses might have recognized him when each examined the photopak. Petitioner's testimony at trial was that he left Jacksonville at approximately 10:00 a.m. on February 13 (the day the robbery occurred), and arrived at Mrs. Morrison's motel in Tampa between 3:00 and 3:30 p.m. that afternoon. (T-122). In explanation of why Ms. Green and Mr. Jones had recognized Petitioner's photograph in the photopak, Petitioner testified that he had made deliveries to the package store while working for a local beer distributor. (T-124,125).

On cross examination, Petitioner was asked by the prosecutor if he had ever been convicted of a crime. (T-126). Petitioner answered in the affirmative, and the prosecutor then asked Petitioner how many times he had been convicted. (T-126). Defense counsel's objection to this question was sustained (T-126) and no further inquiry was made concerning Petitioner's prior criminal record.

As to Petitioner's other contention in support of his petition, an evidentiary hearing was held on January 28, 1980, to obtain testimony relevant to Petitioner's allegation that the prosecuting attorney had made highly prejudicial statements to the jury during his closing arguments. Petitioner testified that Mr. Nichols, the prosecuting attorney, had said: "Let's keep these robbers off the street." "This man Alfred Grizzell has been convicted of every

crime in the book. He is wanted in Volusia County for kidnapping and armed robbery and he is suspected in West Virginia of Murder." "How can you people believe this man here?" (R-6).

At the evidentiary hearing, Respondent published portions of the transcript of the hearing on Petitioner's Motion for New Trial, March 26, 1964. (R-11). At this hearing, in response to Petitioner's allegations regarding the prosecutor's closing argument, Mr. Nichols said, "Judge, from the prosecution's standpoint I don't recall making that remark. I don't remember making it." (R-11). Additionally, at the hearing of March 26, 1964, Judge Tanzler said, "I don't recall that either but we don't have a transcript of the argument. It was not recorded. I don't know how you're going to resolve that

because I don't recall his making that statement."

The evidence presented by Petitioner in support of his allegations of prejudicial statements made by the prosecuting attorney consists solely of his own unverified testimony. However, the references to Petitioner's prior counselless convictions are clearly reflected in the record. (T-126,155).

Loper teaches that impeachment by the use of prior counselless felony convictions is error of the constitutional dimension, and such error can only be deemed to be harmless in circumstances where the proof of the Defendant's guilt is overwhelming, and the jury would have reached the same result without the introduction of the impermissible evidence. (Zilka).

Although in light of the evidence presented, there is a high degree of

possibility that the jury would still have rendered a verdict of guilty, it is impossible in this case to conclusively say that the jury would have reached the same result without the introduction of the impermissible evidence. In light of the standard set in Zilka, I recommend that the petition in the instant case be GRANTED, that Petitioner's conviction be vacated, and that he be afforded a new trial within a short period set by this Court, or otherwise be discharged.

This 16th day of September, 1980, at Tampa, Florida.

PAUL GAME, JR.
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ALFRED EUGENE GRIZZELL,

Petitioner,

-v- NO. 76-880-Civ-J-B

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections,

Respondent.

OBJECTIONS TO THE REPORT AND
RECOMMENDATION OF SEPTEMBER 16, 1980

COMES now respondent, by and through his undersigned attorneys, and makes the following objections to the report and recommendation of the magistrate heretofore filed in the captioned proceeding:

I.

The report and recommendation of the magistrate dated September 16, 1980 was received in the office of the undersigned attorney on September 22, 1980.

II.

Respondent objects to the principle of law applied by the magistrate in determining prejudicial error. In examining the harmless error rule in its relationship to violations of constitutional rights, Chapman v. California, 386 U.S. 18 (1967), established the applicable rule of law as follows: "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The magistrate on p. 4 of the report and recommendation tacitly admitted that the error when viewed in the light of the evidence presented was harmless beyond a reasonable doubt. The magistrate stated: "Although in light of the evidence presented, there is a high degree of possibility that the jury would still have reached a verdict of

guilty,...." This is just another way of saying that the error was harmless beyond a reasonable doubt and thus within the Chapman rule. But then the magistrate goes on to say: "[I]t is impossible in this case to conclusively say that the jury would have reached the same result without the introduction of the impermissible evidence." First, the quoted remarks of the magistrate are contradictory and, secondly, the latter statement presents an impossible standard. For example, in determining when to apply the harmless error rule to constitutional error, no judge would be able to "conclusively say" that the jury would have reached the same result without the error, i.e., the introduction of the impermissible evidence. The magistrate, in effect, has held that a judge must be able to "conclusively say" that the error was

harmless. This imposes a higher standard for determining harmless error than that stated in Chapman.

III.

Respondent objects to the report and recommendation on the ground that it was based in part on the testimony of petitioner as to alleged inflammatory remarks made by the prosecuting attorney in closing argument to the jury. At the hearing on motion for new trial held March 26, 1964, petitioner was represented by the Honorable John E. Palmer and his codefendant Troy Grizzell was represented by the Honorable Everett Richardson. Mr. Richardson, during the course of the hearing, moved for a new trial on the basis that the prosecutor in closing argument had stated: "Let's keep these robbers off the street." It was then that Mr. Nichols responded, "Judge, from the prosecution's

standpoint I don't recall making that remark. I don't remember making it." Judge Tanzler then stated, "I don't recall that either but we don't have a transcript of the argument. It was not recorded. I don't know how you're going to resolve that because I don't recall his making that statement." Then, after this exchange had transpired, Mr. Palmer remarked: "We would like to add that to the argument we have made previously in behalf of the defendant, Alfred Eugene Grizzell." In other words, it was not petitioner who thought to complain about the alleged inflammatory remarks of the prosecutor but it was his brother and codefendant, Troy Grizzell. The court is reminded that this motion for new trial was held in March 1964, shortly after the trial on the merits and reasonably petitioner's memory of what transpired at the trial would have been

better then than in January 1980. But not so! At the hearing held January 28, 1980, as stated in the report and recommendation, petitioner's memory suddenly became crystal clear as to what was said by Mr. Nichols at the trial. Not only did petitioner testify that the prosecuting attorney said, "Let's keep these robbers off the street," but also that the prosecutor had said, "This man Alfred Grizzell has been convicted of every crime in the book. He is wanted in Volusia County for kidnapping and armed robbery and he is suspected in West Virginia of murder. How can you people believe this man here?" This was the first time that petitioner had ever complained as to the latter three remarks allegedly made by the prosecuting attorney. Petitioner suddenly remembered these remarks after a period of approximately sixteen years. The magistrate obviously believed petitioner's

testimony on this point because he recites it on p. 4 of his report and recommendation. Apparently, the magistrate gave no weight at all to the remarks of Judge Tanzler and Mr. Nichols hereinabove quoted.

IV.

Respondent objects to the report and recommendation because same is based on alleged errors that are insufficient to justify federal habeas relief. On cross-examination of petitioner in his state court trial, the following occurred:

CROSS EXAMINATION

BY MR. NICHOLS:

Q You are Alfred Eugene Grizzell?

A Yes, sir.

Q Have you ever been convicted of a crime?

A Yes, sir.

Q How many times?

MR. RICHARDSON: Objection, Your Honor.

MR. PALMER: Objection, Your Honor.

COURT: Objection sustained.

MR. NICHOLS: No further questions.

MR. PALMER: No further questions.

Please note that no objection was lodged to the question, "have you ever been convicted of a crime?" Petitioner was permitted to answer, "Yes, sir." It was only when the prosecutor asked, "How many times?", that objections was made by defense counsel. The only other mention of this prior conviction was in the trial judge's instructions to the jury. Note the following:

> Now, while the defendants were on the stand one of the defendants, Alfred Grizzell, was asked whether he had previously been convicted of a crime and he testified that

> he had. Now, Gentlemen, you will not consider the testimony that he had been previously convicted of a crime in any wise as evidence of his guilt or innocence of the charge on which he is now before you being tried. This is permitted to go before you solely as it affects his creditibility as a witness and as it goes to his veracity or his truthfulness as a witness and nothing else.

The transcript of petitioner's state court trial does not reveal that any objection was made to the above-quoted instruction. Petitioner does not contend that he received ineffective assistance of counsel at his state court trial. Thus, the alleged errors that petitioner now complains of are effectively barred as constituting grounds for federal habeas

relief by the mandate of the United States Supreme Court in Wainwright v. Sykes, 433 U.S. 72 (1977). Florida law is quite explicit that in order to preserve error for appellate review there must be an objection. See Rule 3.390(d), Florida Rules of Criminal Procedure, which sets forth Florida's Contemporaneous Objection Rule which received the United States Supreme Court's stamp of approval in Wainwright v. Sykes, supra.

V.

Respondent objects to the report and recommendation because the magistrate failed to give any consideration whatsoever to the findings of the state court trial judge when this error was reviewed in a 3.850 proceeding. Judge Shepard when reviewing this issue on collateral attack denied petitioner's motion to vacate and remarked in part as follows: "...the

effect of such question and answer on the jury was minimal or non-existent, substantial evidence to support the outcome of the trial remaining." See p. 9 of the instruments attached to Pre-Evidentiary Hearing Stipulation. Petitioner filed a petition for rehearing and in denying same the state trial judge remarked as follows:

> Petitioner alleges that at trial of this cause only one question regarding any prior criminal conviction was asked of and answered by petitioner, and no reference to number or details of prior convictions was permitted by the trial court.
> . . .
>
> The effect of such question and answer on the jury was minimal or non-existent, and excluding such question and answer, substantial evidence to support the outcome of the trial remains.

See Exhibit 2, p. 13, of instruments attached to Pre-Evidentiary Hearing Stipulation. The Florida First District Court of Appeal affirmed the order of the

trial judge per curiam without opinion, reported at 338 So.2d 844. It is admitted that the magistrate was not bound by the findings of the state court judges either at the trial or appellate level. But we do object to the fact that the magistrate obviously gave no weight whatsoever to the state court findings in making his recommendation.

VI.

Respondent objects to the report and recommendation on the ground that the magistrate disregarded the eyewitness testimony of three persons: (1) Navadean Green, (2) Origus Jones, and (3) Wallace H. Earle. The testimony of all three witnesses unmistakably puts petitioner at the scene of the robbery at approximately 12:30-1:00 p.m. on February 13, 1963. This being so, petitioner could not have been in Tampa, Florida, as he claims at the time

the robbery occurred. The jury did not believe petitioner's alibi and the magistrate erred in relying on petitioner's alibi testimony. Respondent respectfully but sincerely urges the court to read the testimony of the above named witnesses. It is noted that petitioner at trial stated that he had seen Mrs. Green and Mr. Jones at the lounge on prior occasions when making deliveries for Sunny South Distributor. If this is true, then certainly this testimony out of petitioner's own mouth would lend more weight and credibility to the identification testimony of both Mrs. Green and Mr. Earle. In other words, Mrs. Green and Mr. Earle were positive of their identification of petitioner because they had seen him on prior occasions!

VII.

Respondent objects to the report and recommendation on the ground that the magistrate misconceived the effect of Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976), en banc. First, note the following quoted from the Zilka opinion:

> Petitioner testified at length in his own behalf. During cross-examination the following exchange occurred:
>
> Q Mr. Zilka, have you ever been convicted of a felony?
>
> A Yes, sir.
>
> Q How many times?
>
> Mr. Pool: We object to that question.
>
> The Court: Overruled; answer the question.
>
> Q How many times, Mr. Zilka?
>
> A Twice.
>
> Q Both of those in Pennsylvania, is that correct?
>
> A Yes, sir.

Id. at 389

Please note that the cross-examination of Zilka was more extensive than that of petitioner sub judice. The Zilka court in determining that constitutional error can be harmless relied on Chapman v. California, supra, and remarked as follows:

> In other words, constitutional error could be said to be harmless only if there is no reasonable possibility that the constitutionally infirm evidence might have contributed to the conviction.

Again, please note the difference between the standard used by the Fifth Circuit in determining the applicability of the harmless error rule and the standard used by the magistrate sub judice. The Fifth Circuit stated that there should be no "reasonable possibility" that the infirm evidence might have contributed to the conviction. But the magistrate held in effect that a judge must be able to

"conclusively say" that the challenged evidence did not contribute to the conviction. The Zilka opinion is replete with instances where the harmless error rule has been applied to constitutional error and in determining that the harmless error rule was applicable, the Zilka court remarked as follows:

> There was no mention of the nature of the prior crimes, which were not similar to the rape charge. Similar crimes would, of course, have a much greater impact upon the jury. Because of the nature of the crime here involved, this type of impeachment would appear to have a minimal effect at most.
>
> The situation sub judice was not of the type where guilt boiled down to the jury's belief of one of two competing witnesses. Such was the case in Loper v. Beto where the victim of the rape was squared off against the defendant who denied the charge. Although Zilka's credibility was being challenged, the case against him did not rest upon the word of a single conflicting witness so that the impeachment could not have such disastrous consequences.

> Accord Bates v. Nelson, supra, 485 F.2d at 96.
>
> Reviewing the record as we have, we believe that the error was harmless beyond a reasonable doubt and that the use of the two prior invalid convictions did not influence the jury's decision. Accordingly, we affirm the district court's denial of the writ of habeas corpus.
>
> Affirmed.

Id. at 393.

In sum, Zilka supports respondent's contention and is opposed to the recommendation made by the magistrate.

VIII.

Respondent objects to the report and recommendation because the magistrate apparently refused to consider the decision of the United States Supreme Court in United States v. Tucker, 404 U.S. 443 (1972), and misapplied Loper v. Beto, 31 L.Ed.2d 374 (1972). Tucker is

informative. At the trial level, the prosecutor on cross-examination asked Tucker whether he had previously been convicted of any felonies. Tucker acknowledged three previous felony convictions. The jury convicted, and the maximum sentence was imposed. Several years later, it was determined that two of the felony convictions were invalid because Tucker had not been represented by counsel. Subsequently, a proceeding under 28 U.S.C.A. § 2255 was instituted claiming that introduction in evidence of prior invalid convictions had fatally tainted the jury's verdict of guilt. In a similar context, this is just exactly what petitioner now urges upon this court. Back to Tucker: The Federal District Judge agreed with Tucker that the use of constitutionally invalid prior convictions on cross-examination for impeachment

purposes was error. But this notwithstanding, it was held that the error was harmless beyond a reasonable doubt in view of the overwhelming evidence that Tucker was guilty of the bank robbery.

On appeal, the Ninth Circuit agreed that the evidence of prior convictions did not contribute to the verdict obtained and that with respect to the verdict of guilty, the error in receiving such evidence was harmless beyond a reasonable doubt. However, because of the probability that the invalid prior convictions may have influenced the trial judge to impose a heavier sentence than he would have otherwise imposed, the Ninth Circuit remanded the case for resentencing without consideration of any prior invalid convictions. The government petitioned for certiorari which was granted. The United States Supreme Court affirmed the decision

of the Court of Appeals. In so doing, it put its unmistakable stamp of approval on that part of the decision of the Court of Appeals holding that the reference to prior convictions on cross-examination for the purpose of impeaching the credibility of Tucker's testimony was harmless error beyond a reasonable doubt. It is the position of respondent that if the use of three admittedly invalid prior felony convictions as shown in Tucker, supra, can be viewed as harmless error, then there is no way in the realm of reason that this court can view the squib of testimony and the state trial judge's instruction set forth in Exhibit 3 as constituting constitutional error of sufficient magnitude to invoke federal habeas corpus relief.

Now then, let's examine Loper v. Beto, supra, and compare what transpired therein

with the record sub judice. At trial, the prosecutor on cross-examination was permitted to interrogate Loper about his previous criminal record for the purpose of impeaching his credibility. Loper admitted in damaging detail to four previous felony convictions. He was found guilty and sentenced to 50 years in prison. Consequently, in a habeas proceeding in federal court Loper asserted that the convictions used to impeach him were constitutionally invalid. The federal district court denied habeas relief and on appeal the Fifth Circuit affirmed. The United States Supreme Court granted certiorari limited to the question:

> DOES THE USE OF PRIOR VOID CONVICTIONS FOR IMPEACHMENT PURPOSES DEPRIVE A CRIMINAL DEFENDANT OF DUE PROCESS OF LAW WHERE THEIR USE MIGHT WELL HAVE INFLUENCED THE OUTCOME OF THE CASE?

In answering this question, the court remarked:

> Unless Burgett is to be forsaken, the conclusion is inescapable that the use of convictions constitutionally invalid under Gideon v. Wainwright to impeach a defendant's credibility deprives him of due process of law.

31 L.Ed.2d at 381. Based on that part of the trial transcript set forth in footnote 1 at 31 L.Ed.2d 377-379, respondent agrees that the way Loper's prior convictions were used did, indeed, constitute a denial of due process of law. Respondent requests this court to read this footnote 1 above referred to and then compare what transpired in Loper's trial with the relatively insignificant and innocuous questions that were asked of petitioner sub judice. Again, see Exhibit 3. There is as much difference between the record in Loper and what transpired sub judice as there is between night and day. Respondent does not

believe that any conscientious and fair-minded lawyer would deny that what transpired in Loper constituted prejudicial error. But it is submitted that when compared with the record in Loper, the complained of interrogation sub judice must be viewed as harmless error. It is believed that the magistrate failed to make a proper comparison between Loper and the case sub judice.

CONCLUSION

For all of the above reasons, respondent urges that the report and recommendation of the magistrate be disregarded and that this court enter an order denying the petition for writ of habeas corpus.

JIM SMITH
Attorney General

By:_____
WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT
The Capitol
Tallahassee, Florida 32301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Objections to the Report and Recommendation of September 16, 1980 has been furnished to Mr. Howard W. Skinner, Assistant Federal Public Defender, P. O. Box 4998, Jacksonville, Florida 32201, by mail, this 25th day of September 1980.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ALFRED EUGENE GRIZZELL,

Petitioner,

vs. Case No. 76-880
Civ-J-B

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections,

Respondent.

ORDER GRANTING PETITION
FOR WRIT OF HABEAS CORPUS

This cause is before the Court on Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, filed herein on December 20, 1976. The Court has given due and careful consideration to the Report and Recommendation of the United States Magistrate, filed herein on September 17, 1980, and to the rule enunciated by the Fifth Circuit in Zilka v. Estelle, 529 F.2d 388, 390 (5th Cir. 1976), that

"constitutional error could be said to be harmless only if there is no reasonable possibility that the constitutionally infirm evidence might have contributed to the conviction." After making an independent review of the record, the Court is of the opinion that there is a reasonable possibility that constitutionally infirm evidence (subsequently invalidated prior convictions) might have contributed to petitioner's original conviction in state court. Such possibility is enhanced by defense counsel's reference during a hearing on a Motion for New Trial held March 26, 1964, to unrecorded but allegedly prejudicial remarks made by the prosecutor in closing argument at trial. (Transcript of March 26, 1964, at 11.) The Court therefore finds that the Magistrate's Report and Recommendation is both legally

sound and consistent with the ends of justice. Accordingly, it is

ORDERED that the Petition for Writ of Habeas Corpus, filed herein on December 20, 1976, is granted. The State shall commence a new trial within ninety (90) days of the date of this order, or the prisoner shall otherwise be discharged.

DONE AND ORDERED at Jacksonville, Florida, this 12 day of December, 1980.

_____
UNITED STATES DISTRICT JUDGE

Wallace E. Allbritton, Esquire
Assistant Attorney General
The Capitol
Tallahassee, Florida, 32301

Howard W. Skinner, Esquire
Assistant Federal Public Defender
P. O. Box 4998
Jacksonville, Florida, 32201

Alfred Eugene GRIZZELL,
Petitioner-Appellee,

v.

Louie L. WAINWRIGHT, Secretary
Department of Corrections,
Respondent-Appellant.

No. 81-5044

United States Court of Appeals,
Eleventh Circuit.

Nov. 29, 1982.

The United States District Court for the Middle District of Florida, Susan H. Black, J., entered judgment granting writ of habeas corpus, and Secretary of Florida Department of Corrections appealed. The Court of Appeals, Roney, Circuit Judge, held that there was reasonable possibility that constitutionally infirm evidence could have contributed to jury's decision as to defendant's credibility, and hence to his conviction, and thus the evidence, which consisted of defendant's response to prosecutor's cross-examination as to prior counselless felony convictions and which was elicited when petitioner was testifying to alibi supported by other evidence, could not be deemed harmless error.

Affirmed.

1. Habeas Corpus --25.1(1)

Where state court did not apply contemporaneous objection rule to reject federal constitutional claim, but instead reached merits of claim, federal habeas court was not precluded from addressing merits of petitioner's claim. 28 U.S.C.A. § 2254.

2. Habeas Corpus --30(1)

Regardless of which court system initially decides matter, state or federal, ultimate determination of whether federal constitutional error is harmless is federal question. 28 U.S.C.A. §2254.

3. Habeas Corpus --30(1)

Although deference should, in federal habeas corpus proceedings, be paid to state court's evaluation of how proceedings in court might affect jury, such deference had to give way where state court decision could not be reconciled with federal constitutional law.

4. Habeas Corpus --30(1)

If, upon reading of trial record, federal habeas court is strongly convinced evidence of guilt was overwhelming and jury would have reached same verdict without tainted evidence and that there is no reasonable possibility constitutionally infirm evidence might have contributed to conviction, then error is deemed harmless. 28 U.S.C.A. § 2254.

5. Habeas Corpus --25.1(8)

There was reasonable possibility that constitutionally infirm evidence could have contributed to jury's decision as to defendant's credibility, and hence to his conviction, and thus the evidence, which consisted of defendant's response to prosecutor's cross-examination as to prior counselless felony convictions and which was elicited when petitioner was testifying to alibi supported by other evidence, could not be deemed harmless error. 28 U.S.C.A. § 2254.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and PITTMAN*, District Judge.

RONEY, Circuit Judge:

This case turns on whether a state prosecutor's cross-examination of a defendant as to prior counselless felony convictions, admittedly a due process violation, constituted harmless error. The state courts held it to be harmless error. The federal district court held it was not and granted the petition for writ of habeas corpus under 28 U.S.C.A. § 2254. We affirm.

---

* Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

The question as to prior convictions was propounded on cross-examination when the petitioner was testifying to an alibi which, if believed, would have put him in a different city at the time of the crime. Alfred Eugene Grizzell was convicted in 1964 of robbing a lounge and package store in Jacksonvile, Florida. At trial three witnesses placed him in the immediate vicinity of the crime. One witness, a clerk at the lounge, was present during the robbery. Another witness, also an employee, saw petitioner make a purchase on the day in question but did not witness the robbery. The third witness was a customer at the store immediately prior to the robbery. Because the incident appeared suspicious to him, the third witness had made a mental note of the license plate number of an automobile parked at the store just before the robbery. It was later determined that the automobile was owned by petitioner's brother, his codefendant.

Grizzell presented an alibi defense, claiming mistaken identity. He testified he was in Tampa and not with his brother in Jacksonville, introducing into evidence a check-in receipt from a Tampa motel dated the day of the robbery. The owner of the motel identified her signature on the registration receipt, but testified she could not recall what time petitioner checked into the motel. Other defense witnesses stated they saw petitioner at the Tampa motel the morning after the robbery.

Testifying in his own behalf, petitioner suggested the identifying employees' statements were attributable to their recognition of him from previous

occasions on which he had made deliveries to the lounge while employed by a distributor, rather than their recognition of him from the robbery.

The following exchange occurred during the prosecutor's cross-examination of petitioner:

Q Have you ever been convicted of a crime?

A Yes, sir.

Q How many times?

Mr. Richardson: Objection, Your Honor.

Court: Objection sustained.

Mr. Nichols: No further questions.

Mr. Palmer: No further questions.

The prosecutor made no other efforts to impeach Grizzell's testimony by showing prior criminal convictions. At the conclusion of trial, the judge instructed the jury as follows:

> Now, while the defendants were on the stand one of the defendants, Alfred Grizzell, was asked whether hehad previously been convicted of a crime and he testified that he had. Now, Gentlemen, you will not consider the testimony that he had been previously convicted of a crime in any wise as evidence of his guilt or innocence of the charge on which

> he is now before you being tried. This is permitted to go before you solely as it affects his credibility as a witness and as it goes to his veracity or his truthfulness as a witness and nothing else.

The prior convictions used to impeach Grizzell's credibility subsequently were set aside by the state imposing them because they were obtained without affording him the right to counsel. Pursuing his state remedies in this case, Grizzell moved to vacate and set aside his conviction under Rule 3.850 of the Florida Rules of Criminal Procedure, that state's post-conviction relief statute. The state court judge denied the collateral attack. He determined that the effect on the jury of the question and answer regarding the invalid convictions was "minimal or non-existent," that the outcome of petitioner's trial "could not reasonably be thought to be changed" even if the question and answer had been excluded, and that there was "substantial evidence" remaining to support the conviction. A second state court judge echoed these conclusions in denying Grizzell's petition for rehearing.

In federal court Grizzell argued that the admittedly unconstitutional use of his prior counselless convictions to impeach his credibility was not harmless error.

[1] The State initially contends that Grizzell's claims were not cognizable in a federal habeas corpus proceeding because there was a failure to object to the question and jury instruction, which then became nonreviewable under Florida's

contemporaneous objection rule. Since the fact that prior convictions were without counsel is peculiarly within the knowledge of a defendant, we would be inclined to strictly enforce the contemporaneous objection rule as to such claims. We are bound by our former decisions, however, which hold that when a state court does not apply the contemporaneous objection rule to reject a federal constitutional claim, but instead reaches the merits of the claim, then a federal habeas court also must address the merits. Thomas v. Blackburn, 623 F.2d 383, 386 (5th Cir. 1980), cert. denied, 450 U.S. 953, 101 S.Ct. 1413, 67 L.Ed.2d 380 (1981), and cases cited therein. See County Court of Ulster v. Allen, 442 U.S. 140, 152-54, 99 S.Ct. 2213, 2222-2223, 60 L.Ed.2d 777 (1979). Here the state courts did not apply the contemporaneous objection rule in denying the collateral attack, even as an alternative ground of decision. They concluded that the improper impeachment had a minimal or nonexistent impact on the jury and there was substantial evidence to support the verdict, thus reaching the merits of Grizzell's claim.

The State next argues that the district court did not give proper deference to the state court determination that the constitutional error was harmless. Neither the magistrate's report and recommendation nor the district court's order contain any reference to the state court decisions denying collateral relief. While the State admits in its brief that the federal court was not bound by the decision of the state court judges, it goes on to argue that "it is precisely this type of disregard of

state court findings without stating any reason therefor that mandated the result reached in Sumner v. Mata," 449 U.S. 539; 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), intimating that the district court erred in not following the state court determination.

The extent of deference owed by the district court to the state courts' conclusions regarding the existence of harmless error under the federal Constitution depends on whether the determination is a question of fact, rather than a question of law or a mixed question. Sumner v. Mata, ___ U.S. ___, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) (per curiam); Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). See 28 U.S.C.A. § 2254(d).

From decisions in areas involving other types of constitutional errors, it appears that the existence of constitutional harmless error is a mixed question of law and fact because it requires "the application of constitutional principles to the facts as found." See Brown v. Allen, 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed.2d 469 (1953) (opinion of Frankfurter, J.). See also Sumner v. Mata, ___ U.S. ___, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) (constitutionality of pretrial identification procedures); Cuyler v. Sullivan, 446 U.S. at 342, 100 S.Ct. 173, 73 L.Ed.2d --- (1982) (whether statements by defendant's counsel were sufficiently definite to constitute a request for a continuance); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 2021, 72

L.Ed.2d 474 (1982) (whether defendant enjoyed effective assistance of counsel); Lee v. Hopper, 499 F.2d 456, 462 (5th Cir.), cert. denied, 419 U.S. 1053, 95 S.Ct. 633, 42 L.Ed.2d 650 (1974) (whether defendant had effective assistance of counsel and entered guilty plea voluntarily).

[2,3] Regardless of which court system initially decides the matter, state or federal, the ultimate determination of whether federal constitutional error is harmless is a federal question. Chapman v. California, 386 U.S. 18, 21 87 S.Ct. 824, 826, 17 L.Ed.2d 705 (1967). Although deference should be paid to the state courts' evaluation of how proceedings in court might affect the jury, that deference must give way when the state court decision cannot be reconciled with federal constitutional law. See Sumner v. Mata, ___ U.S. ___, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); Cuyler v. Sullivan, 446 U.S. at 341-42, 100 S.Ct. at 1714-1715. The differences between the state and federal courts in this case did not involve purely factual questions. The constitutional error was clear. Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), held a due process violation occurs when prior counselless convictions, constitutionally invalid under Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), are used to impeach a defendant's credibility if their use might well have influenced the outcome of the case. See Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).

Trying to articulate fixed principles for a harmless constitutional error determination is difficult in the context of cases like this. The approach has been to cast on the state the burden of showing harmless error, once the improper testimony is used. The key inquiry becomes whether the error was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1976). Jones v. Estelle, 622 F.2d 124 (5th Cir.), cert. denied, 449 U.S. 996, 101 S.Ct. 537, 66 L.Ed.2d 295 (1980).

Sometimes the decision is made easier because the defendant had a record of constitutional convictions as well as the improperly used unconstitutional ones, so that impeachment by use of prior convictions would have been available to the state. Gibson v. United States, 575 F.2d 556 (5th Cir.), cert. denied, 439 U.S. 898, 99 S.Ct. 263, 58 L.Ed.2d 246 (1978), and Jones v. Estelle, supra, involved the impeachment of a defendant's testimony by the use of several prior convictions some of which were without counsel and therefore invalid, and some of which were valid. The former Fifth Circuit held the use of the counselless convictions was harmless error in each case, given the presence of the valid convictions. Gibson v. United States, 575 F.2d at 559; Jones v. Estelle, 622 F.2d at 126. In this case, however, only constitutionally invalid convictions were used.

[4] We have previously articulated this approach: if, upon a reading of the trial record, the court is firmly convinced the evidence of guilt was overwhelming and the

jury would have reached the same verdict without the tainted evidence and that there is no reasonable possibility the constitutionally infirm evidence might have been contributed to the conviction, then the error is deemed harmless. Zilka v. Estelle, 529 F.2d 388, 392 (5th Cir. 1976).

[5] In this case it is clear that if Grizzell's testimony is believed, he was not physically present when the crime was committed. The alibi demonstrated no internal inconsistencies. It was supported to a degree by the innkeeper's testimony. It was not implausible. In this respect, Grizzell's case resembles that of Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976). There the object of the appellant's collateral attack on his state murder conviction was the prosecution's use of ten previous counselless misdemeanor convictions to impeach his self defense testimony.

Discussing the state's contention that the use of the misdemeanor convictions constituted harmless error, the former Fifth Circuit noted:

> The success of appellant's testimony hinged in large measure on the credibility assessment made of him by the jury. The State's use of the misdemeanor convictions went, of course, directly to the question of appellant's credibility. We reject the State's argument that introduction of the nine uncounseled misdemeanor convictions was

> harmless error beyond a reasonable doubt.

529 F.2d at 455 (citations omitted).

So it is here. We are not unmindful of the substantial evidence placing Grizzell at the scene of the crime. As noted in previous cases, however, the question is not "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of...," but whether the evidence complained of may have influenced the fact-finder's deliberations. Harryman v. Estelle, 597 F.2d 927, 929 (5th Cir. 1979), cert. denied, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980) (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230-231, 11 L.Ed.2d 171 (1963)).

This case differs in at least two respects from Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976), which held a similar error harmless. First, in Zilka neither the attorneys nor the judge commented on the use to which the evidence could be put. Here, the judge specifically instructed the jury that it could use the evidence to evaluate credibility, an instruction we must presume was heard and followed. We do not rely on the testimony that the prosecutor commented on the prior convictions in closing argument. Petitioner testified that the prosecuting attorney had said: "Let's keep these robbers off the street. This man Alfred Grizzell has been convicted of every crime in the book. He is wanted in Volusia County for kidnapping and armed robbery and he is suspected in West Virginia of

Murder. How can you people believe this man here?" The prosecutor did not recall making that statement. Without a clear finding by the district court on this fact, we do not rely on it for decision.

Second, petitioner's testimony here was not implausible as it was in Zilka. Zilka's testimony corroborated the state's case in some respects and was directly contrary to the physical evidence in others. The story was patently implausible and could not reasonably have been accepted by the jury in the face of all other evidence. Here, the problem is with identification testimony, not with the physical acts concerning the crime. Acceptance of Grizzell's testimony could be rationalized on the ground that the other witnesses simply were wrong in identification. It would not require a determination that those witnesses were intentionally lying.

Whether the jury would believe Grizzell, no one can tell. But he was entitled to have his testimony weighed by the jury unencumbered by the unconstitutional convictions. The jury was instructed specifically that the convictions could be used to evaluate his credibility. The district court correctly decided that there is a reasonable possibility that the constitutionally infirm evidence might have contributed to the jury's decision as to credibility, and hence to the conviction.

AFFIRMED.